A

Mohamad Sofri bin Che Ani v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–32 OF 2004
TENGKU BAHARUDIN SHAH, HELILIAH AND KN SEGARA JJCA
4 JULY 2009

C

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 3,632g of cannabis — Appeal against conviction and sentence — Dangerous Drugs Act 1952 s 39B(1)(a)

D

Acting on information received, a police raiding party arrested the appellant. The police discovered cannabis wrapped in plastic packages in the carrier basket of the motorcycle the appellant was riding. The appellant was charged, convicted and sentenced to death for trafficking in 3,632g of cannabis ('the drugs'), contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He appealed against his conviction and sentence.

E

Held, dismissing the appeal:

(1) The High Court's affirmative finding of the fact of possession with knowledge was derived from the facts evaluated by the trial judge after having taken into consideration the contentions of both the prosecution and counsel for the defence. The finding was arrived at after a deductive analysis of the evidence led by the prosecution (see para 9).

F

(2) The trial judge had discredited the defence allegation of the existence of one Zainol — claimed to be riding as the appellant's pillion — as fictitious. There was an absence of evidence to substantiate the existence of this Zainol. In the face of the contrariety of the evidence for the prosecution and the defence, the trial judge made a finding in favor of the prosecution. There was no cogent basis in the instant appeal to find that the trial judge had misdirected himself on the explanation given by the appellant in rebutting the case for the prosecution (see paras 13, 15 & 17).

G

H

(3) The trial judge had expressly dealt with the alleged misapplication of s 37(j) of the DDA by the chemist. He had referred to judicial propositions which elucidated the application of s 37(j) of the DDA. He had also appraised the four-stage analysis undertaken to identify the nature of the drugs and the quality and quantity of the drugs. In the total absence of evidence to the contrary, the defence's contention was hollow especially when those decisions had been further fortified at the

I

appellate stage. The defence's complaint that the trial judge had misapplied s 37(j) of the DDA was without merit (see paras 18 & 20).

(4) The absence of evidence relating to fingerprints in the instant case did not in any way detract from the finding of fact relating to the possession (see para 19); *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489 referred.

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang diberi, rombongan serbuan polis telah menangkap perayu. Polis menemui kanabis yang dibalut dengan bungkusan plastik di dalam bakul pembawa motosikal yang ditunggang oleh perayu. Perayu dituduh, disabitkan dan dijatuhkan hukuman mati kerana mengedar 3,632g kanabis ('dadah') bertentangan dengan s 39B(1)(a) of the Akta Dadah Berbahaya 1952 ('ADB'). Dia merayu terhadap sabitan dan hukumannya.

Diputuskan, menolak rayuan:

(1) Penemuan secara positif oleh Mahkamah Tinggi mengenai milikan dengan pengetahuan didapati daripada fakta yang diteliti oleh hakim perbicaraan setelah mengambilkira hujah-hujah pihak pendakwaan dan pembelaan. Penemuan didapati selepas suatu analisis deduktif terhadap bukti dijalankan oleh pihak pendakwaan (lihat perenggan 9).

(2) Hakim perbicaraan meragui dakwaan pihak pembelaan mengenai kewujudan Zainol — yang didakwa merupakan pembonceng perayu — sebagai rekaan semata-mata. Tiada keterangan yang mengesahkan kewujudan Zainol. Dalam percanggahan keterangan bagi pihak pendakwa dan pembelaan, hakim perbicaraan memutuskan berpihak kepada pihak pendakwaan. Tiada asas meyakinkan dalam rayuan ini yang menunjukkan hakim perbicaraan telah salah arah dalam keterangan yang diberikan oleh perayu dalam mematahkan kes pendakwaan terhadapnya (lihat perenggan 13, 15 & 17).

(3) Hakim perbicaraan dengan jelas telah berurusan dengan dakwaan salah pengaplikasian s 37(j) ADB oleh pakar kimia. Beliau telah merujuk kepada saranan kehakiman yang menerangkan pengaplikasian s 37(j) ADB. Beliau juga telah menilai analisis empat peringkat yang digunakan bagi mengenalpasti 'sifat' dadah dan kualiti serta kuantiti dadah-dadah tersebut. Dengan ketiadaan bukti yang menunjukkan sebaliknya, hujah pembelaan adalah kosong terutama apabila keputusan-keputusan tersebut telah dikukuhkan selanjutnya di peringkat rayuan. Dakwaan pembelaan bahawa hakim perbicaraan telah tersalah mengaplikasikan s 37(j) ADB adalah tanpa merit (lihat perenggan 18 & 20).

(4) Ketiadaan keterangan berkaitan dengan cap jari dalam kes ini tidak, dalam apa jua cara, menyimpang daripada penemuan fakta berkenaan dengan milikan tersebut (lihat perenggan 19); *Gunalan a/l Ramachandran & Ors v PP* [2004] 4 MLJ 489 dirujuk.]

Notes

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301, FC (refd)
Basil bin Omar v PP [2003] 1 MLJ 192; [2002] 4 AMR 4525, CA (refd)
Chan Pean Leon v PP [1956] MLJ 237 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (refd)
Lim Kheak Teong v PP [1985] 1 MLJ 38, FC (refd)
Loo Kia Meng v PP [2000] 3 MLJ 664; [2000] 3 CLJ 653, CA (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Letchumanan [2000] 4 MLJ 449; [2000] 4 CLJ 685, HC (distd)
PP v Md Alim bin Samad [1998] 1 MLJ 260; [1998] 5 CLJ 590, HC (distd)
PP v Tan Tatt Eek [2005] 4 CLJ 460, FC (refd)
PP v Teh Eng Wah [1999] MLJU 120; [1999] 8 CLJ 451, HC (distd)
Wan Mohd Kamil bin Wan Mohamad v PP [2003] 2 MLJ 17; [2003] 1 CLJ 665, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), (da), (da)(vi), 37(j), 39B(1)(a)

Appeal from: Criminal Trial No 45–27 of 2002 (High Court, Alor Star)

G Ravinshankar (R Shankar Gandhi & Associates) for the appellant.
Mangaiarkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Heliliah JCA (delivering judgment of the court):

[1] The appellant was charged and convicted for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA 1952') and the mandatory sentence of death was accordingly imposed. His appeal is against the conviction and sentence.

[2] Although there are ten grounds specified in the petition of appeal they have properly been summarised into four that are to be addressed in this appeal namely:

(a) that the learned judge in the High Court has erred in making a determination that the appellant was in possession of the drugs;

(b) that there has been a misdirection in the failure to give due consideration to the appellant's defence;

(c) misapplication of s 37(j) of the DDA 1952 that relates to the qualitative analysis of the drugs;

(d) break in the chain of evidence.

[3] The charge reads:

> Bahawa kamu pada 22 Oktober, 2001, jam lebih kurang 11:50 malam di hadapan gerai makan Stesyen Minyak PETRONAS, Taman Bersatu, di dalam Daerah Kulim, di dalam Negeri Kedah Darul Aman, telah didapati memperedarkan dadah berbahaya iaitu cannabis seberat 3,632 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[4] The facts are the following. On 22 October at about 11.30pm, a police party led by PW5 laid an ambush in Taman Bersatu, Kulim in the vicinity of a Petronas gas station and some food stalls. Based on information received the police party was expecting a male Malay using motorcycle Model Kriss, bearing the registration No PEQ 7660 and suspected to be trafficking in dangerous drugs.

[5] It was PW5 from a distance of 5–10 feet who saw the motorcycle ridden by a male Malay who having passed by the area then stopped at the front of a food stall next to the Petronas station. The rider was alone. PW5 thereupon instructed his men to apprehend the motorcycle after which he himself went to the motorcycle to arrest the male Malay (the appellant in this appeal) who at that time was still seated on the motorcycle. PW5 saw a red plastic package inside the carrier basket of the motorcycle. He found upon examination of the red plastic package, four transparent plastic packets containing compressed slabs of dried leaves suspected to be ganja.

[6] A physical search on the person of the appellant then resulted in a recovery of a wallet from the back pocket of his trousers, inside which was found his identity card, his own BSN Giro Card, an RHB Bank Card, a 'C' category licence and currency of RM45 and 1 Riyal Arab Saudi. PW1 who conducted a four stage analysis of the compressed slabs of dried leaves arrived

at a finding that the substance is cannabis within its definition in s 2 of the DDA 1952. It is also established that the motorcycle No PEQ 7660 is registered in the name of the appellant.

[7] At the conclusion of the case for the prosecution the learned High Court judge made a determination that a prima facie case is established on the basis of the fact of possession with knowledge of the drugs and since the weight of the drugs is 3,632g the presumption under s 37(da)(vi) of the DDA 1952 is rendered applicable. We propose to deal with the issue of possession which in this appeal constitutes the principal ground upon which the decision of the trial judge has been challenged.

[8] The Federal Court in *Public Prosecutor v Tan Tatt Eek* [2005] 4 CLJ 460 has again reiterated the judicial pronouncement extolled in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 that 'in order to invoke the presumption of trafficking under s 37(da) of the Act, there must be an express finding of possession as understood in criminal law, and not a legal presumption of possession and knowledge as provided under s 37(d)' per Nik Hashim FCJ at p 467 in *Tan Tatt Eek*. In the present appeal we note that the trial judge had in his grounds of judgment as well as at the end of the prosecution's case resolved:

> ... Saya berpuas hati bahawa tertuduh bukan sahaja mempunyai kawalan dan jagaan ke atas bungkusan tersebut tetapi juga mempunyai pengetahuan bahawa isi kandungan bungkusan berwarna merah tersebut iaitu P7 adalah cannabis.

GROUNDS (A) AND (B)

[9] This affirmative finding of the fact of possession with knowledge is derived from the facts evaluated by the trial judge after having taken into consideration the contentions of both the prosecution and counsel for the defence. The finding was arrived at after a deductive analysis of the evidence led by the prosecution.

[10] The motorcycle ridden by the appellant as seen by the police witnesses is a motorcycle registered in his name. The appellant at the time that he was apprehended was observed by PW5 to be alone from the moment he was first spotted. The trial judge deduced that he alone at that point of time was having access to the carrier basket mounted to the motorcycle PEQ 7660. The red plastic package (P7) containing drugs found in the carrier basket was of such a size that it was apparent and visible rendering it impossible for the appellant to have been ignorant of the fact of possession. A specific finding of fact was also made that in view of the appellant appearing with the drugs at the particular place where the police party was waiting on the basis of the information

received his knowledge of the contents was inferential taking into consideration not only the size of the package but also the large amount of drugs. The large amount recovered according to the judge also triggered the presumption pursuant to s 37(da)(vi) of the DDA 1952. This inference arrived at on the totality of the evidence is to be discerned from the statement 'Oleh yang demikian saya berpendapat berdasarkan beberapa keterangan yang ada dan hal keadaan kes ini bungkusan berwarna merah itu adalah kepunyaan tertuduh dan dengan demikian dia sudah semestinya mengetahui isi kandungannya'. The observation of Thomson J in *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237 at p 239 was applied on the issue of possession. The relevant excerpt is:

> 'possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Edn, p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.
>
> To put it otherwise, there is a physical element and a mental element which must both be present before possession is made out. The accused must not only be so situated that he can deal with the thing as if it belonged to him, for example have it in his pocket or have it lying in front of him on a table, it must also be shown that he had the intention of dealing with it as if it belonged to him should he see any occasion to do so, in other words, that he had some animus possidendi. Intention is a matter of fact which the nature of things cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances, whether these surrounding circumstances make out such intention is a question of fact in each individual case.

[11] This observation of Thomson J has been cited with approval by the Federal Court in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337.

[12] Counsel for the appellant at the conclusion of the case for the prosecution has contended that on the issue of possession, the exposed position of the motor carrier made it easily accessible to anyone. This contention is to rebut the situation that the appellant has exclusive possession. The contents of the red plastic package could not be known if it is not opened and it was not found on the person of the appellant. Reliance was emplaced on *Public Prosecutor v Teh Eng Wah* [1999] MLJU 120; [1999] 8 CLJ 451; *Public Prosecutor v Md Alim bin Samad* [1998] 1 MLJ 260; [1998] 5 CLJ 590; *Public Prosecutor v Letchumanan* [2000] 4 MLJ 449; [2000] 4 CLJ 685. The trial judge found these inapplicable as the facts and circumstances in this appeal were distinguishable from those found in the authorities cited.

[13] The alleged misdirection on the issue of possession requires further evaluation in the light of the defence canvassed since it is averred that a misdirection has recurred. On this second issue we take note that the trial judge has discredited the defence allegation of the existence of another person whose name is purportedly Zainol bin Haya as fictitious. Zainol bin Haya according to the appellant is a friend who was with him on the night of arrest accompanying him as a pillion rider. The version of the appellant is that on the material night he was proceeding from an uncle's house in Taman Selaseh Kulim and had dropped a visit at a friend's house situate at Taman Kenari. Upon leaving that place to return home the said Zainol bin Haya requested a lift from the appellant. According to the appellant Zainol brought a red plastic package which was placed on the carrier the contents of which were unknown. Zainol upon inquiry had also told him that the red plastic contained a box. At the place where the appellant was eventually apprehended the version given was that at the request of the said Zainol who wanted to make a phone call, the appellant had stopped at the material place and while attempting to park the motorcycle he was set upon by two persons who identified themselves as policemen. The additional and specific allegation made by the appellant is that he did see at the police station that Zainol has been also been arrested. The version mounted by the appellant, according to counsel for the defence, succeeded in casting a doubt on the issue of exclusive possession.

[14] With regard to this matter we are of the view that the trial judge has properly addressed the law in disagreeing with the deputy public prosecutor that the appellant must prove the existence of Zainol bin Haya and the failure to do leads to an adverse inference. The trial judge in disposing this issue stated:

> Dalam undang-undang jenayah bukanlah menjadi beban kepada tertuduh untuk membuktikan dia tidak melakukan kesalahan yang dipertuduhkan. Sebaliknya beban sentiasa terletak di atas pihak pendakwaan pada setiap masa untuk membuktikan kesnya di akhir kes melampaui keraguan yang munasabah. Perkara ini telahpun dijelaskan oleh Edgar Joseph Jr H dalam kes *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355 pada ms 361 seperti berikut:
>
> > I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt (*Goh Ah Yew v Public Prosecutor* [1949] MLJ 150). However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence.

Persoalan seterusnya ialah sama ada tertuduh telah berjaya menimbulkan keraguan ke atas kes pihak pendakwaan bahawa pada masa berkenaan tertuduh menunggang motorsikalnya berseorangan dan cannabis tersebut berada dalam milikan tertuduh. Untuk itu mahkamah perlu meneliti keterangan tertuduh dan keterangan saksi-saksi pihak pendakwaan secara keseluruhan.

[15] The trial judge having dealt with the point of law as above proceeded on the basis that the evidence of SP5 was to be accepted where SP5 gave evidence that he had arrived at the material place 15 minutes before the appellant's arrival and the latter was seen to be arriving there as the solo rider on the motorcycle. The judge disbelieved the evidence of the appellant on the alleged existence or presence of Zainol bin Haya and in contrast accepted the evidence of SP6 investigating officer who refuted that another person by the name Zainol bin Haya was also arrested on the same evening. There was therefore an absence of evidence to substantiate the existence of Zainol bin Haya. In the face of the contrariety of the evidence for the prosecution and the defence the trial judge made a finding in favor of the prosecution.

[16] We find having considered the issues raised as above there is therefore basis to defer to the determination made by the trial judge bearing in mind the statement in *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38 at p 40 per Hashim Yeop Sani FCJ (as he then was):

... what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as:

(1) the views of the trial judge on the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd.* where he quoted from Lord Thankerton's judgment in *Thomas v Thomas* that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

> The learned appellate judge held that the learned president had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned president was 'plainly unsound'? (*Thomas v Thomas*). On the facts of this case we do not think so.

[17] There is no cogent basis in this appeal for us to state that the trial judge has misdirected himself on the explanation given by the appellant to rebut the case for the prosecution.

GROUNDS (C) AND (D)

[18] This leads to the consideration of the last two issues which in our view are devoid of merit. The trial judge has expressly dealt with the alleged misapplication of s 37(j) of the DDA 1952 by SP1 the chemist whereby counsel for the defence has urged that the evidence of SP1 the chemist be rejected. The trial judge has referred to judicial propositions which have elucidated the application of s 37(j) in the cases of *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664; [2000] 3 CLJ 653; *Basil bin Omar v Public Prosecutor* [2003] 1 MLJ 192; [2002] 4 AMR 4525 and *Wan Mohd Kamil bin Wan Mohamad v Public Prosecutor* [2003] 2 MLJ 17; [2003] 1 CLJ 665. In the instant appeal the trial judge has appraised the four phases of analysis undertaken to identify the nature of the drugs and the quality and quantity of the drugs. We find that in the total absence of evidence to the contrary the contention of counsel for the defence is hollow especially when those decision have been further fortified at the appellate stage by the decision in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 at p 314 in which Augustine Paul (now FCJ) stated, inter alia:

> [17] The second part of the submission of counsel relates to the nature of the evidence that must be adduced from the chemist. It is true that the chemist did not give any evidence of the tests carried out by him in arriving at his conclusion. It has been held by the trilogy of the (then) Supreme Court cases of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, *Public Prosecutor v Lam San* [1991] 3 MLJ 426 and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless it is inherently incredible or the defence calls evidence in rebuttal by another expert. The rationale of this view is lucidly explained in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 where it was held that the evidence of a chemist on dangerous drugs analysed by him is one of fact and not of opinion. In the circumstances the evidence of a chemist is not controlled by s 51 of the Evidence Act 1950 thereby making it unnecessary for him to testify on the tests conducted by him in arriving at

his conclusion. The evidence of the chemist is therefore sufficient. The trial judge had accepted it. The defence did not seriously challenge the evidence beyond merely putting to the chemist that his analysis was improper and inadequate. The chemist disagreed with the suggestion. This submission of counsel cannot therefore be sustained.

[19] Finally in the circumstances of this appeal the absence of evidence relating to fingerprints do not in any way detract from the finding of fact relating to possession as explained in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489. We do not see the necessity of repeating the passages and merely to indicate that the alleged gaps in this case are illusory in nature.

[20] The upshot, in our view, is that this appeal is without merit. The appeal is therefore dismissed. The decision of the High Court judge on conviction and sentence are consequentially affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon